that such comments are more properly considered part of the Interconnection proceeding, and, as such, are far beyond the scope of this proceeding. Nevertheless, having been raised in this proceeding, a perfunctory reply is appropriate.

WorldCom argues that requiring Class A ILECs to publish their attachment rates would be consistent with the Commission's finding in the Interconnection[47] proceeding that these ILECs must file copies of their preexisting interconnection agreements by June 30, 1997. This argument is now moot in light of the decision rendered by the U.S. Court of Appeal for the Eighth Circuit overturning portions of the Interconnection Order.[48] Access to poles and conduits prior to passage of the Telecommunications Act of 1996[49] was achieved through private negotiations. Indeed, the entire history of access to poles and conduits since enactment of Section 224 has operated within a framework of private negotiations with the Commission's pole attachment complaint process reserved as a measure of last resort. The Commission has always recognized and encouraged this framework. Requiring ILECs to publish rates and provide MFN treatment would irretrievably undermine the framework for negotiations. The Eighth Circuit decision

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[47] Interconnection Order at ¶ 165. See also 47 C.F.R. § 51.303.

[48] Iowa Utilities Board v. FCC No. 96-3321 (Eighth Circuit filed July 18, 1997, slip op.) The Court's decision specifically overturned the MFN, or "pick and choose," provision (47 C.F.R. § 51.809) stating that it would "...frustrate the Act's design to make privately negotiated agreements the preferred route to local telephone competition," (p. 99) and "thwart the negotiation process and preclude the attainment of binding negotiated agreements." (p. 116). The Court also overturned the rule requiring the filing of pre-existing agreements (47 C.F.R. § 51.303) (p. 124).

[49] Telecommunications Act of 1996, Public Law No. 104-104.

recognizes this fact.

Requiring ILECs to publish attachment rates and provide MFN treatment would -- from a practical, if not strictly legal, sense -- transform such rates from voluntarily negotiated rates into tariffs. There is no basis for such a change. The purpose of such requirements would be to allow attaching parties to "keep up with the Joneses," so to speak, and roughly gauge how their own separately negotiated agreement compares to others. However, Section 224 already contains a process whereby aggrieved parties may challenge the rates and terms being charged them. The pole attachment complaint process provides a "lowest common denominator" for all attachers covered by it and obviates the need for any publishing or MFN requirement.

Moreover, the only provision for requiring the publishing of pole attachment rates within the Communications Act of 1934, as amended, is when an ILEC receives a Section 251 interconnection request which in turn leads to an agreement that is subject to Section 252(h). Unless pole attachments are included in a general Section 251 interconnection request, there is no statutory requirement that ILECs publish pole attachment rates. The Commission should affirm that this is the only circumstance under which an ILEC would be required to publish such a rate. Moreover, publishing such a rate within an interconnection agreement would not require the ILEC to subsequently publish any other attachment rates unless those rates, too, were included within separate interconnection agreements. The statutory language and history of Section 224, both initially and as subsequently amended, simply does not support the imposition of publishing or MFN requirements. Consequently, the Commission should reject arguments to the contrary.

IV. With Respect To The Placement And Attachment Of Wire Plant, The Commission Should Reject The Electric Utilities' Request For A Blanket Exemption From The "Essential Facilities" Doctrine.

As preliminary matter, the intent of this proceeding is to address certain changes that may be necessary with respect to modifying the Commission's pole attachment formula and the pole attachment complaint process. A determination of whether electric utility poles are "essential facilities" is far beyond the scope of this proceeding. Moreover, even if this proceeding were the proper venue, such determinations are made on a case-by-case, fact-specific basis. The sweeping request made by AEP *et al.*, for a blanket determination, besides being beyond the scope of this proceeding, is inappropriate in its expanse. Nevertheless, some comment on the validity of the argument is warranted.

Unlike wireless plant attachments, which can be located almost anywhere, wireline plant is restricted to poles and conduits, the placement of which is severely limited by zoning restrictions. The comments of AEP *et al.*, notwithstanding, the alternatives to electric utility poles and conduits are not limitless.[50] Among the alternatives listed by AEP *et al.*, are railroads, highway authorities, and subway authorities.[51] However, railroads, highway authorities, and transit authorities, do not own and maintain pole networks. Furthermore, even if they did, most local zoning authorities would not permit railroads, highways, and subways to run up and down every residential neighborhood street simply in order to meet the distribution requirements of

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[50] Comments of AEP *et al.* at p. 40 (filed June 27, 1997).

[51] Comments of AEP *et al.*, at p 39 (filed June 27, 1997).

telecommunications service providers.

In any event, attacking the applicability of this doctrine to electric utilities is beside the point. Section 224 has withstood repeated legal challenges since its enactment. Congress specifically and explicitly included poles owned by electric utilities. Unless and until Section 224 is overturned, regulatory action arising from, and in accordance with, the Act should be presumed to be within the valid jurisdictional discretion of the regulatory agency unless stayed by judicial fiat.

As a final point, it should be noted that the argument put forth by AEP *et al.*, turns on itself. AEP *et al.*, argue that the "essential facilities" doctrine only applies between competitors, the understanding being that electric utilities do not compete against telecommunications service providers.[52] They then state that even if electric utilities and other telecommunications service providers are competing, electric utility poles are not essential facilities because of the alternative of other attachment mediums. They then state that even if there are no other alternative attachment mediums, the doctrine should not apply because of regulatory constraints. In short, AEP *et al.*, argue that regulation of electric utility poles is not necessary because electric utility

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[52] AEP *et al.*, make the argument that electric utilities do not compete with ILECs for the provision of telecommunications service, thus the "essential facilities" doctrine does not apply to their facilities. Such a statement raises the obvious rhetorical question of why these "non-competing" utilities have applied for and received "exempt telecommunications company" status under Section 34(a)(1) of the Public Utility Holding Company Act of 1935, as amended by section 103 of the Telecommunications Act of 1996. (15 U.S.C. §§ 79 *et seq.*) That these "exempt telecommunications companies" may not presently be actively engaged in providing competitive telecommunications service is irrelevant. The "essential facilities" doctrine does not require active competition between parties, merely the potential for competition.

poles are regulated. Ignoring all of the other fatal flaws of this argument, the logic put forth by AEP *et al.* in support of their argument is, in the final analysis, circular and should be rejected by the Commission.

V. The Comments By The Electrical Utilities With Respect To Their Poles And Conduit Not Being "Essential Facilities" Illustrates Why The Commission Should Act Within Its Discretion And Extend The Pole Attachment Complaint Process To Agreements Between ILECs And Utilities.

The electric utilities' attempt to wriggle free from Commission oversight of attachments to electric utility poles highlights the very real and significant threat to level, competitive playing fields posed by the continued exclusion of ILEC-Utility agreements from the Commission's pole attachment complaint process. As USTA stated in its initial comments, it is violative of the spirit of the Act that reasonable bounds are placed on attachment rates utilities may charge non-ILEC telecommunications carriers but not on what they may charge ILECs providing identical telecommunications service.[53] It is especially violative if the utility itself is also providing competitive telecommunications service while extracting exorbitant attachment rates from an ILEC.[54] Even if the electric utility is not providing competitive telecommunications service

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[53] Comments of USTA at p. 15 (filed June 27, 1997).

[54] Indeed, the Commission has already approved an application filed by AEP Communications, Inc., ("AEPC") a wholly-owned Ohio subsidiary of American Electric Power Company, Inc., ("AEP"). The Commission's Order references AEPC's application wherein it stated that "it will be engaged, directly or indirectly, through one or more 'affiliates'... and exclusively in the business of providing telecommunications service..." Application of AEP Communications, Inc. For Determination of Exempt Telecommunications Company Status Under (continued)

directly, it still possesses the ability to improperly affect competitive market outcomes simply by charging the ILEC a rate higher than that charged to CLECs. Indeed, the CLEC could simply be affiliated with the utility in a business venture that did not involve cross-ownership.[55] The utility would have every incentive to adversely affect the competitive marketplace outcome in such an instance in favor of its business partner. USTA would again urge the Commission to extend its pole attachment complaint process to agreements between ILECs and utilities in those states where the Commission has jurisdiction over pole attachments.

CONCLUSION

For the above-stated reasons, USTA urges the Commission to recognize that full cost recovery does not occur until both the original booked costs and the disposal costs have been fully recovered. The responsibility for cost recovery of attacher-initiated modifications resulting

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Section 34 of the Public Utility Holding Company Act of 1935, as added by Section 103 of the Telecommunications Act of 1996, Order, File No. ETC 96-12, DA 96-1148 (released July 18, 1996) at ¶ 2. Another variation is the recent announcement by Potomac Electric Power Company ("Pepco") and RCN Corporation ("RCN"), whereby Pepco and RCN will jointly provide competitive local telephony, CATV, and Internet access service in the District of Columbia area over Pepco's local fiber optic facilities. The importance of Pepco's local facilities is noted in a newspaper article covering the venture, stating: "Pepco's more important contribution to the venture is its vast network of access to the region's homes and businesses through the rights of way it owns to provide electrical power." (*The Washington Post,* Wednesday, August 6, 1997, page A12.)

[55] For example, UtiliCorp United and PECO Energy recently announced the formation of EnergyOne, L.L.C., a nationwide branded energy marketing company. Among other services, EnergyOne will market AT&T residential communications service. UtiliCorp and PECO Energy each hold a 50% equity interest in EnergyOne. (June 24, 1997 press release from AT&T website.)

in additional attachment capacity used by subsequent attachers lies with the attacher, not with the pole-owner. The Commission should adopt its proposed gross book cost method. Adopting the proposed gross book method will result in more accurate rates without a corresponding increase in administrative inefficiencies or complexities. TELRIC is not an appropriate forward-looking cost methodology. The Commission should also adopt its proposed Part 32 mapping without major modification.

The Commission should reject the proposals advanced by some commenting parties that would establish pole load capacity as the determinant for allocating pole costs. The Commission should also affirm that attaching parties do not accrue ownership interests in the pole based on the access granted them. The Commission should also adopt its proposed half-duct occupancy presumption. The Commission should acknowledge that suggestions to impose requirements allowing "pick and choose" and mandating the publishing of pre-existing agreements are beyond the scope of this proceeding. Finally, the Commission should view the electric utilities attempts to subvert the "essential facilities" doctrine as an illustrative example of why the pole attachment complaint process should be extended to cover agreements between them and ILECs.

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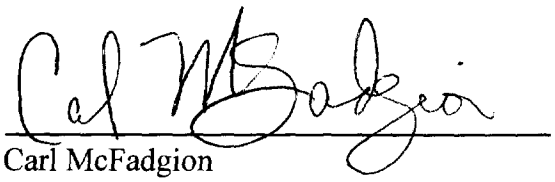
CERTIFICATE OF SERVICE

I, Carl McFadgion, do certify that on August 11, 1997 copies of the Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.



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